

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEWIS CLIFTON HENDERSON,

Defendant-Appellee.

UNPUBLISHED

May 3, 2011

No. 299790

Midland Circuit Court

LC No. 10-004389-FH

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

WHITBECK, J. (*dissenting*).

The majority concludes that disqualification of the trial judge for yelling “screw you” at defense counsel is not warranted. The majority relies on a determination that the comment was a fleeting breach of courtesy that was followed by an acknowledgement of regret. I respectfully disagree. Rather, I believe that the trial judge’s conduct was so inappropriate as to require disqualification. Accordingly, I would reverse.

I. FACTS

Henderson was charged as a fourth habitual offender with operating a motor vehicle while under the influence of marijuana causing death.¹ At the request of defense counsel, on August 11, 2010, the trial judge held a *Cobbs*² hearing in his chambers. In a supporting affidavit filed with his motion for disqualification, defense counsel attested that, at this hearing, the trial judge initially made statements speculating that if Henderson had been sentenced to prison instead of felony probation, he would not have been driving and the victim would still be alive. Defense counsel further attested that the following exchange occurred:

[The trial judge] then said to me that it would be a sentence of 10-years minimum or “he can have is [sic] trial and it’s 19.” I replied to the judge “so I’m clear and so when I explain to my client, it’s 10-years if he pleads as charged and if he exercises his right to a trial you’re going to punish him and it’s 19.” [The trial

¹ MCL 257.625(4)(a).

² *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

judge] immediately became enraged screaming at me “SCREW YOU . . . GET OUT . . . YOU’LL GET YOUR TRIAL . . . THIS HEARING [SIC] OVER . . . GET OUT.”

Defense counsel moved to disqualify the trial judge on Thursday, August 12, 2010, and noticed the motion hearing for Wednesday, August 18, 2010. However, the trial judge scheduled the hearing for 4:30 p.m. the following day, Friday, August 13, 2010. Defense counsel could not attend the hearing due to previous commitments and informed the trial judge accordingly. Following the trial judge’s request, defense counsel submitted a letter via fax detailing his scheduling conflicts. Defense counsel attests that the trial judge received his faxed letter and acknowledged that counsel could not be in court at 4:30 p.m. Defense counsel attests that the trial court never informed his office that it would conduct the hearing regardless of his presence.

The motion hearing did not actually start until 5:24 p.m. The trial judge explained that the motion needed to be decided expeditiously because several unrelated motions were pending on August 18, 2010, and trial on this matter was scheduled for August 30, 2010. The trial judge reasoned that *when* he denied the motion, a judge appointed by the State Court Administrative Office could review the decision, which could take an unknown amount of time.

At the hearing, the trial judge noted that the court received counsel’s affidavit, and that MCR 2.003(D)(2) mandated that all grounds on which the motion was based must be supported by an affidavit. He went on to state that under the court rule no additional assertions could be considered and that he would decide the motion without oral argument. Additionally, he believed that counsel’s affidavit provided sufficient information to rule on the motion without the attorneys present.

The trial judge went on to recap the history of the case and his version of what transpired in his chambers. The trial judge said he told counsel “that his client had a choice to make and that the minimum sentence, should the case proceed to trial, could be as high as 19 years.” He denied saying that Henderson would get 19 years if he exercised his constitutional right to a trial. The trial judge stated that defense counsel then said in a disrespectful tone, “you’re going to punish him for having a trial.” The trial judge said he took great offense at the accusation that he was depriving Henderson the right to a fair trial. He then acknowledged that in the course of the exchange, he said, “Screw you, and get out of my office.” The trial judge denied yelling, but expressed regret. Further, he acknowledged that the comment was unprofessional but saw it as proportional to the accusation of unethical conduct.

On Thursday, August 19, 2010, the reviewing judge conducted a de novo review hearing of the trial judge’s decision. This hearing was limited to the court record, specifically the transcript from the disqualification hearing. For purposes of the review hearing, the reviewing judge accepted all the allegations in defense counsel’s affidavit as true, including the allegations concerning the trial judge’s statements quoted above. The reviewing judge acknowledged that the trial judge “became enraged and screamed” the comments at defense counsel. The reviewing judge went on to find that the statement—“he can have his trial and it’s 19”—was ambiguous. The reviewing judge found that the record reflected that defense counsel tried to clarify the ambiguity by asking if Henderson would get 19 years if he went to trial. The reviewing judge also noted that the trial judge presumably screamed at defense counsel “because he was upset that the

defense attorney had innocently or deliberately misconstrued what he was saying and cast what he was saying in a sinister light.”

II. ANALYSIS

A. STANDARD OF REVIEW

When reviewing a motion to disqualify, the Court “asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”³ A judge’s own inquiry into actual bias “is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief.”⁴

B. LEGAL STANDARDS

MCR 2.003(C) provides, in part:

(C) Grounds.

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, __ US __; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

C. APPLYING THE STANDARDS

Regarding bias, “[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”⁵ Following a trial judge screaming “Screw you” at counsel during a court proceeding, an objective and reasonable attorney would perceive that his client’s right to due process was likely at serious risk of being

³ *Caperton v Massey*, __ US __; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).

⁴ *Id.* at 2263.

⁵ *Caperton*, 129 S Ct at 2262.

infringed.⁶ Accordingly, defense counsel had reason to believe that his client could not likely receive a fair trial.⁷

There was, in my opinion, a serious risk of actual bias implicating Henderson's due process rights in contravention of the Fifth and Fourteenth Amendment. The trial judge's conduct was therefore at odds with the MCR 2.003(C) and warranted his disqualification in this matter. I would reverse.

/s/ William C. Whitbeck

⁶ See MCR 2.003(C)(1)(i).

⁷ US Const, Am VI; see also *Caperton*, 129 S Ct 2252.